SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 287

MRS. JOHN B. EDMONSON,

Petitioner,

vs.

G. M. McWILLIAMS, TRUSTEE IN BANKRUPTCY OF F. T. NEWTON AND MRS. F. T. NEWTON, BANKRUPTS,

Respondent

BRIEF OF MARYLAND CASUALTY COMPANY AND NATIONAL SURETY CORPORATION, SURETIES, IN OPPOSITION TO AMENDED PETITION FOR CERTIORARI.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 287

MRS. JOHN B. EDMONSON,

Petitioner,

vs.

G. M. McWILLIAMS, TRUSTEE IN BANKRUPTCY

APPLICATION OF NATIONAL SURETY CORPORATION AND MARYLAND CASUALTY COMPANY TO FILE BRIEF IN OPPOSITION TO ORIGINAL AND AMENDED APPLICATION FOR CERTIORARI IN THE ABOVE CASE.

Come the Maryland Casualty Company and the National Surety Corporation, by their Attorneys, and show unto the Court that they, and each of them, are creditors of Mr. and Mrs. F. T. Newton, Bankrupts by reason of the fact that they, and each of them, became and were sureties on the contract bonds of said bankrupts and paid large sums to persons furnishing labor and materials to said bankrupts; that the claims on behalf of each of them have been duly filed with the Referee in Bankruptcy for the Southern Dis-

trict of Mississippi and have been approved; that they are, therefore, interested in the outcome of the application for certiorari herein, and they represent to the Court that a brief filed by their counsel would be helpful in determining the questions involved.

WHEREFORE, they move the Court that they be permitted to file this motion and brief thereto attached, in opposition to application for certiorari.

Respectfully submitted,

WILLIAM H. WATKINS,
Attorney for Maryland Casualty Company and National Surety Corporation, Sureties.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 287

MRS. JOHN B. EDMONSON,

Petitioner,

vs.

G. M. McWILLIAMS, Trustee in Bankruptcy of F. T. Newton and Mrs. F. T. Newton, Bankrupts,

Respondent

BRIEF OF MARYLAND CASUALTY COMPANY AND NATIONAL SURETY CORPORATION, SURETIES, IN OPPOSITION TO AMENDED PETITION FOR CERTIORARI.

Statement

The record in this case before the Court on application for certiorari consists of five printed volumes of testimony, three volumes of which are numbered 11,306, United States Circuit Court of Appeals, Fifth Circuit, and two volumes of which are numbered 11,905, before the same court. The case was heard before the United States Circuit Court of Appeals, not only on the five printed volumes in question, but on unprinted portions of the record from the United

States District Court for the Southern District of Mississippi, which are not before the Court.[1]

Prior to April 1, 1943, a partnership composed of F. S. Glenn, F. T. Newton and Mrs. Ethel Flurry Newton (Mrs. F. T. Newton), in Hattiesburg, Mississippi, were engaged in a general contracting business (R. 892-896), and upon the date mentioned had some twenty-odd contracts with the United States Government for constructing war projects. The partnership furnished its creditors a statement of partnership property showing real estate of the value of $451,000.00, which statement was used as a basis for credit. Upon the date aforesaid, the partnership was dissolved and a new partnership organized, composed of Mr. and Mrs. F. T. Newton, which partnership assumed all of the obligations of Newton & Glenn, which partnership had under construction a number of Government projects. As of April 1, 1943, the new partnership issued a financial statement (R. 326-330) which showed as partnership assets real estate, at Hattiesburg, Mississippi, of the value of $451,000.00. The Maryland Casualty Company and National Surety Corporation became sureties on contract bonds of Newton & Glenn, and, likewise, upon bonds covering contracts taken by F. T. Newton, a partnership, composed of himself and Mrs. Newton. By reason thereof, they became, and still are, largely indebted to the sureties. Mrs. F. T. Newton was not only a member of the partnership composed of herself and her husband, but, individually, executed an indemnity agreement whereby she agreed to protect each of them against any kind of loss, injury or damage by reason of the execution of bonds for Newton & Glenn or F. T. Newton. Upon the 6th day of October, 1943, there

[1] In this brief, when referring to the pages of the record, in Cause No. 11,306, we use (R), and in referring to the pages of the record, in Cause No. 11,905, we use (R. 2).

were filed in the Office of the Clerk of the Chancery Court in Hattiesburg, Forrest County, Mississippi, three deeds of conveyance to Mrs. John B. Edmonson, the petitioner in this case, a sister of Mrs. F. T. Newton; one from F. T. Newton to Mrs. John B. Edmonson (R2 102), in which deed the property was not specifically described except by Exhibit "A" to the deed. The second deed was from F. T. Newton to Mrs. John B. Edmonson (R2 115), in which the property was specifically described. The third deed was from Mrs. Ethel Flurry Newton (Mrs. F. T. Newton) to Mrs. John B. Edmonson (R2 126). In addition, there was conveyed to Mrs. Edmonson a promissory note of Tommy B. Sims held by Mr. and Mrs. Newton, in the sum of $2,500.00, which comprised all of the real estate owned by either of them other than the homestead in which they resided. The sureties exhibited the original and amended bills of complaint in the District Court of the United States for the Southern District of Mississippi for the purpose of setting aside the conveyances aforesaid as being without consideration, fraudulent and void. The purpose thereof was to subject the property described in said conveyances to the indebtedness due the plaintiffs (R2 5-17). A petition for involuntary bankruptcy, as well as amended and supplemental petition, was filed against Mr. and Mrs. F. T. Newton by certain of their creditors asking that they be adjudged bankrupts, among other reasons, for the alleged fraudulent conveyances of the property herein involved to Mrs. John B. Edmonson, a sister of Mrs. F. T. Newton. The case was heard before a jury and a verdict rendered by the jury declining to adjudge them as bankrupts. A motion by the petitioning creditors was made for a new trial accompanied by a motion for judgment notwithstanding the verdict. The District Judge sustained the motion for petitioning creditors (R. 1655), wherein in a long opinion (R. 1657) he held that the

conveyances from the Newtons to Mrs. Edmonson were made to hinder and delay creditors in the collection of their debts. The Court used the following language:

> "Under this set of facts a Court can reach no other conclusion that that these conveyances were made at least to hinder and delay creditors in the collection of their debts and the law thereupon presumes that they were fraudulent. It is true a lot of these transactions occurred after November 3, but nevertheless all of this evidence is admissible for the purpose of determining whether or not there was an intent to hinder, delay and defraud the creditors on October 6 when the deeds were filed for record. The testimony shows that the defendants are insolvent and owe debts far in excess of their assets as of November 3 and as of October 6 and as of December 6. The testimony of Newton himself is so vague and naturally so, not being a bookkeeper and accountant, that it is not entitled to much weight. He simply did not know and could not tell. While Dumain's audit was competent in evidence, yet it is so weak because of its nature that it cannot, by any stretch of the imagination, overcome the facts heretofore detailed. It was figured as of August 31, a date that is not material in the disposition of the cause, and throws very little light upon the solvency of the defendants.
>
> "The law is that if the conveyances were made with the intent to hinder, delay or defraud creditors that the burden of proof is upon the defendants to show solvency if they rely upon solvency. They have failed to do this. In addition, these conveyances both to the Edmonsons and to de Villentroy constituted preferences of these creditors over the other creditors, and from the whole testimony in this case this conclusion cannot be escaped."

The Court sustained the motion of petitioning creditors and directed a verdict adjudicating Mr. and Mrs. Newton bankrupts. While neither Mr. nor Mrs. Edmonson were

parties to this bankruptcy proceeding, there was a full, complete and exhaustive inquiry into the dealings between Mr. and Mrs. Newton and Mr. and Mrs. Edmonson. All of the parties, including Mr. and Mrs. Edmonson, testified in the case; accordingly, the defendants were adjudged bankrupts. An appeal was taken to the United States Circuit Court of Appeals, Fifth Circuit, and the judgment of the District Court was affirmed, *Newton, et al.*, v. *Glenn, et al.*, 149 Fed. (2d) 879. In affirming the judgment, the Court used the following language, at Page 880:

> "It would be useless to review the evidence in the 1900-page record of the long jury trial. The burden of proof was on the petitioning creditors; they met it by enough evidence of the insolvency of the defendants, of the appointment of a receiver to take charge of their property, and of transfers, conveyances, preferences, and concealments by them, to establish *prima facie* all the acts of bankruptcy charged in the amended and supplemental petitions."

Certiorari was denied by this Court, No. 395, October Term, 1945, 326 U. S. 758, 66 S. Ct. 100, 90 L. Ed. 456.

Such further proceedings were had as that G. M. McWilliams, the respondent herein, was elected Trustee in Bankruptcy of the Estate of F. T. Newton, et al. He filed an amended complaint in the cause instituted by the sureties referred to, succeeded to all of the rights of the sureties therein asserted, as well as the rights conferred by law upon him as Trustee in Bankruptcy under the Federal Statute (R2 50), upon which complaint issue was taken by the petitioner (R2 64). At the trial of the case before the District Judge, the following facts appeared from the undisputed testimony:

Prior to March 31, 1943, a partnership known as Newton and Glenn, composed of F. S. Glenn, F. T. Newton, and his

wife, Mrs. F. T. Newton, carried on a general contracting business. They had under construction on the aforesaid date approximately twenty-five Government war contracts. Upon the date aforesaid, the partnership was dissolved; F. T. Newton and wife acquired the partnership assets, assumed the obligations thereof, and undertook to carry out said contracts, taking on approximately three new ones.

The enterprise was being financed through the Union Planters Bank of Memphis, Tennessee, hereinafter referred to as the Memphis Bank, though the loans were participated in by the First National Bank of Atlanta, Georgia, and the American National Bank of Nashville, Tennessee. The management of the loans, however, was in the hands of the Memphis Bank. The loans were secured by the personal endorsement of Mrs. F. T. Newton, and by the assignment of funds accruing from the United States Government on the projects in the course of construction.

On and prior to August 14, 1943, Newton was indebted to the Memphis Bank for approximately $1,500,000.00, and the officers of the Bank, not being entirely satisfied with the remittances they were receiving from the United States Government on the various projects, requested Newton to come to Memphis for a conference. This he did. He was optimistic and there was nothing to arouse the suspicion of the bankers.

Upon the 15th day of October, 1943, officers and attorneys of the three banks went to Hattiesburg. They went to Newton's office, at least, some of them did. Newton had represented to them that he owed only $140,000.00 to subcontractors. They found that he was owing to subcontractors approximately $650,000.00. In addition thereto, he wished the sum of $230,000.00 for the payment of the payroll at Brunswick, Georgia, which was to have been paid on or before October 16th. The conference lasted through

two days. It was stated that the employees at the Brunswick plant were threatening a riot, were milling about the plant, and the superintendent was afraid of physical violence. The representatives of the banks had the statement furnished by Newton both to the banks and the sureties as of March 31, 1943, from which it appeared that he and Mrs. Newton owned real estate in Hattiesburg, Mississippi, exclusive of furnishings, of the value of $451,100.00, producing monthly rentals of $5,734.50. Mr. Newton was very insistent that the banks let him have additional funds to meet his requirements. The banks intimated to him that, if he would give them a deed of trust on the real estate in Hattiesburg, Mississippi, included in his statement of March 31, 1943, they would take under consideration the question of advancing him sufficient funds to carry on. Without informing the bankers in the slightest manner that he had conveyed the property away, he took representatives of the banks, visited the property, and pointed it out to them as that property included in his statement. When asked if they could procure a deed of trust thereupon in order to secure any additional advances, he stated he would have to consult Mrs. Newton in respect thereto. Ostensibly for this purpose, he left the banks' representatives and returned in about two hours with a statement that Mrs. Newton was unwilling to execute a deed of trust on the property. He then insisted that it was the duty of the Bank to make the advances on the security already held. Quite extensive interviews were had with Mrs. Newton as well as with Mr. Newton, with no results.

Late in the afternoon of Saturday, October 16th, they became very suspicious and, with Mr. M. M. Roberts, attorney at law of Hattiesburg, Mississippi, went to the County Court House for the purpose of ascertaining what conveyances, if any, had been made of the property owned by Mr. and Mrs. Newton and referred to in the statement

of March 31, 1943. At the Court House, they found that no deeds had been indexed or recorded but, among the papers in the Courtroom, they found the deeds above referred to, which were marked "Filed October 6, 1943," with revenue stamps placed thereupon October 9, 1943, and they also noted the obvious erasures in the deeds which clearly showed that the instruments had been back-dated.

It was then proposed that a conference should be had in Atlanta, Georgia, between the interested banks upon the following Sunday, which would be the 24th day of October. Mr. Newton attended, with his attorney, Mr. Wills. They again requested Newton to give them security upon the real estate shown in the statement. Neither Mr. Newton nor Mr. Wills made any statement to the effect that the property had been conveyed away. (Williams—R. 338). (Wills—R. 1157). (Moise—R. 1679). (Berry—R. 1725). (House—R. 1747). (Alexander—R. 1789). (Wilson—R. 1792). (Bond—R. 1825). (Wilson—R. 2790).

The evidence undisputedly established, and the District Judge so found, that Mr. and Mrs. Newton not only conveyed to Mrs. Newton's sister every particle of real estate which they owned other than their home, but had disposed of and concealed every portion of their remaining property so that there was absolutely nothing whatever for creditors, and they were utterly bankrupt.

The District Judge found that the conveyances to Mrs. Edmonson were fraudulent insofar as the grantors were concerned; that they intended to place the property beyond the reach of their creditors.

The Court held, however, that Mrs. Edmonson, the grantee, did not participate therein, and was an innocent purchaser thereof, and that she was entitled to hold the property until she received the sum of $104,000.00, being the alleged indebtedness owing by F. T. Newton to Mrs. Edmonson.

Findings and decree of the District Judge, dated August 28, 1946 (R2—920), as well as supplemental finding of fact (R2—931), wherein the District Judge held that Mr. and Mrs. F. T. Newton, the grantors, retained benefits flowing from the property conveyed until October 16, 1943.

The Court found that the property conveyed was of value of $450,000.00, and that the consideration paid by Mrs. Edmonson was inadequate but was without fraudulent intent (R2—932).

The petitioner, Mrs. Edmonson, took no appeal from this decree. However, the respondent trustee appealed therefrom to the United States Circuit Court of Appeals, Fifth Circuit, in which court the decree of the District Judge was reversed and remanded with directions that the deed be cancelled. The case is officially reported, *McWilliams* v. *Edmonson,* Fifth Circuit, 162 Fed. (2d) 454.

ARGUMENT

Point I

The findings of fact and conclusions of law of the District Judge were unreasonable and the United States Circuit Court of Appeals, Fifth Circuit, correctly so held and reversed the decree appealed from.

The Circuit Court of Appeals, in passing on a question of this kind, is not merely exercising the right of review. It does not sit as a mere Court of error. The case has a new hearing. The Court must examine the record and try the case *de novo.*

In the case of *Edwards* v. *Lain,* 7 Cir., 112 Fed. (2d) 343, the Court used the following language, at page 347:

> "The true rule in this respect is set forth in Keller v. Potomac Company, 261 U. S. 428, 43 S. Ct. 445, 449, 67 L. Ed. 731: ' * * * In that procedure (in

> equity), an appeal brings up the whole record and the appellate court is authorized to review the evidence and make such order or decree as the court of first instance ought to have made, giving proper weight to the findings on disputed issues of fact which should be accorded to a tribunal which heard the witness.' "

The appellant, G. M. McWilliams, Trustee in Bankrupt in this case, is entitled to take advantage of the provisions of the Bankruptcy Act, as well as the State statutes of the State of Mississippi, and the common law thereof dealing with the subject.

U. S. C. A., Title 11, Section 110, Paragraph e, contains the following language:

> "(1) A transfer made or suffered or obligation incurred by a debtor adjudged a bankrupt under this title which, under any Federal or State law applicable thereto, is fraudulent as against or voidable for any reason by any creditor of the debtor, having a claim provable under this title, shall be null and void as against the trustee of such debtor.
>
> "(2) All property of the debtor affected by any such transfer shall be and remain a part of his assets and estate, discharged and released from such transfer and shall pass to, and every such transfer or obligation shall be avoided by, the trustee for the benefit of the estate. The trustee shall reclaim and recover such property or collect its value from and avoid such transfer or obligation against whomever may hold or have received it, except a person as to whom the transfer or obligation specified in paragraph (1) of this subdivision e is valid under applicable Federal or State laws."

Section 1327, Mississippi 1942 Code, provides that creditors may attack fraudulent conveyances. A copy of said section is attached and made *Appendix I* hereto.

Section 265, Mississippi 1942 Code, is to the same effect, a copy of which section is hereto attached as *Appendix II.*

If the purpose of the grantor be to place the property beyond the reach of his creditors, the statute applies, regardless of the solvency of the grantor. *Citizens Bank* v. *Budding,* 65 Miss. 284, 4 So. 94.

Point II

A voluntary conveyance without consideration is void as to creditors and may be set aside under the statute.

Under the Mississippi law, a voluntary conveyance without consideration is void as to the creditors of the grantor. *Swayze* v. *McCrossin,* 13 Smedes & M. 317; *Thomason* v. *Neely,* 50 Miss. 310; *Shaw* v. *Millsaps,* 50 Miss. 380; *Holmon* v. *Hudson,* 188 Miss. 87, 193 So. 628.

Not only is this true, but even where a valuable consideration was present, a conveyance is void and fraudulent if the same was merely a device intended to hinder, delay or defraud creditors. *Buckingham et al.* v. *Wesson, Administrator, et al.,* 54 Miss. 526; *Brister* v. *Moore,* 16 So. 596; *Pope* v. *Pope,* 40 Miss. 516. The case does not turn upon the solvency of Mr. and Mrs. Newton upon any particular date. However, the fact that Mr. and Mrs. Newton were insolvent upon the date of the execution of the deeds to Mrs. Edmonson was settled in the bankruptcy proceedings, to which reference has been made.

Point III

The presence of fraud is determined by what is known as "Badges of Fraud."

In the case of *Humbird* v. *Arnett,* Mont., 44 Pac. (2d) 756, the following rule is announced:

> "The following are some of the badges of fraud generally recognized by the authorities: A fictitious con-

sideration for a conveyance (27 C. J. 484; Moore on Fraudulent Conveyances, 229); false statements made of the consideration for a conveyance or mortgage (27 C. J. 485; Moore, supra, 225); a transfer made in anticipation of a suit to be commenced (27 C. J. 488; Moore, supra, 238); an excessive effort to give the transaction the appearance of fairness and regularity and to conceal its real nature (27 C. J. 493; Moore, supra, 246); the retention of the possession of the property transferred after conveyance as before (27 C. J. 494; Moore, supra, 247); and the reservation of a trust to the use of the same person after the conveyance as before (27 C. J. 495; Moore, supra, 248)."

See C. J. S., Vol. 37, page 922, where the rule is very clearly announced.

In the case of *Toone* v. *Walker,* (Okl.), 243 P. 147, the court used the following language:

"In the case of Brooks *v.* Garner, 20 Okl. 236, 94 P. 694, 97 P. 995, this court held, where the question of good faith is involved, the party asserting the fraud is driven to the necessity of establishing it by circumstantial evidence and by proving the acts, known in law as badges of fraud, and adopts the definition given by Wait on 'Fraudulent Conveyances', sec. 225, that—

" 'Badges of fraud are suspicious circumstances that overhang a transaction, or appear on the face of the papers. The possible indicia of fraud are so numerous that no court could pretend to anticipate and catalog them. A single one may stamp the transaction as fraudulent, and, when several are found in combination, strong and clear evidence on the part of the upholder of the transaction will be required to repel the conclusion of fraud.' "

In the case of *Reed* v. *Lavecchia,* 193 So. 439, 187 Miss. 413, there was presented a suit to set aside a conveyance made by one Lavecchia to his sister-in-law. The Chancellor held that the conveyance was free from fraud and dismissed

the bill. The Supreme Court reversed the case and entered a decree for the complaining creditor, assigning as its reason the numerous badges of fraud presented in the case. The court used the following language:

> "On the issue as to whether there was a bona fide sale from Jos. V. Lavecchia to his sister-in-law the following well-known labels and badges of fraud are disclosed by the evidence: Inadequacy of consideration, transaction not in usual course or mode of doing business, absolute conveyance as security, secrecy, insolvency of grantor, transfer of all his property, attempting to give evidence of fairness by conscripting sister-in-law as a conduit for passing title to the wife, retention of possession, failure to take a list of the property covered by the conveyance which was commingled with some furniture and fixtures belonging to his father's estate, relationship of the parties, and transfer to person having no apparent use for the property."

In support of which we submit to the Court as follows:

We call the attention of the court to the fact that the District Judge found as a matter of fact and law that the grantors in the respective deeds, Mr. and Mrs. F. T. Newton, were guilty of actual fraud. Certainly, very important legal consequences affecting the rights of the grantee, Mrs. Edmonson, flow therefrom. The fraud of Mr. and Mrs. Newton having been established, such fraud of the grantors is attributed to the grantee and it becomes the duty of the grantee, Mrs. Edmonson, clearly to establish her good faith and freedom from fraud.

See the case of *Richards* v. *Vaccaro & Co.*, 67 Miss. 516.

See also Am. Jur. Vol. 24, Section 20, Page 176.

Mrs. Edmonson, however, not only has the duty of exculpating herself from the presumption of bad faith arising out of the fraud of the grantors in the deed but the fiduciary relation existing between the grantors and the grantee in

that Mrs. Edmonson was a sister of Mrs. Newton; lived about five miles apart; visited frequently; were very intimate friends. During the spring and summer of 1943 Mrs. Edmonson worked a few months in Mrs. Newton's office; drew a salary of $150.00 a month doing general office work, filing, keeping books. Mrs. Edmonson (R. 434-435) (R. (2) 194).

Mr. Edmonson testified that the Newtons and the Edmonsons were very friendly; that Mrs. Newton had access to anything that the Edmonsons had (R. (2) 465).

If the Newtons had the purpose to convey this valuable property so that the same could not be reached by the creditors and at the same time belonged to them, they selected the most natural route, a conveyance to Mrs. Newton's sister.

In the case of *Ham* v. *Ham*, 110 So. 583, 146 Miss. 161, the Court held that a fiduciary relation existed between brothers and a presumption of fraud and bad faith arose therefrom shifting the burden of proof of good faith to the grantee. The Court used the following language:

> "When such a relation exists, and the parties thereto —'consciously and intentionally deal and negotiate with each other, each knowingly taking a part in the transaction, and there results from their dealing some conveyance or contract or gift, * * * the principle literally and directly applies. The transaction is not necessarily voidable, it may be valid, but a presumption of its invalidity arises which can only be overcome, if at all by clear evidence of good faith, of full knowledge, and of independent consent and action.' 2 Pomeroy Equity Jurisprudence (4th Ed.), Section 957.
>
> "The burden of overcoming this presumption is on the party claiming under the conveyance, contract, or gift. Meek v. Perry, 36 Miss. 190; Hitt v. Terry, 92 Miss. 710, 46 So. 829."

The same rule was announced in *Bourn* v. *Bourn*, 140 So. 518, 163 Miss. 71; *Watkins* v. *Martin*, 147 So. 656, 167 Miss. 343; *Hitt* v. *Terry*, 92 Miss. 710, 46 So. 829; *Norfleet* v. *Beall*, 82 Miss. 538, 34 So. 328; *Meek* v. *Perry*, 36 Miss. 190; *Plant* v. *Plant*, 76 Miss. 590.

Therefore, in view of the fact that the District Judge convicted the grantors, Mr. and Mrs. F. T. Newton, of actual fraud in making the conveyances complained of and the grantees sustained a fiduciary relation to the grantors, it became their duty by clear and convincing testimony to show the bona fide nature of the transaction.

(a) The testimony of Mr. and Mrs. Edmonson is evasive, contradictory, lacking in frankness, and condemns the entire transaction.

It will be conceded that by reason of the fact that the grantors in the deeds were guilty of actual fraud and had the purpose of placing the property beyond the reach of their creditors, and due to the further fact that a fiduciary relation existed between Mrs. Newton and Mrs. Edmonson, a very high duty was cast upon Mrs. Edmonson to show by clear and convincing testimony that the conveyances were made by the Newtons and accepted by her in good faith, without any notice of the purpose of the Newtons to defraud their creditors, and that she was a bona fide purchaser thereof without participating in the fraud of the Newtons whatsoever. In order to hear this burden it was necessary that Mr. and Mrs. Edmonson produce independent and disinterested testimony in respect to the bona-fide of the transaction which was not done. It was certainly incumbent upon them to be frank with the Court and to give a clear and consistent and trustworthy account of the transaction. Upon the other hand, the testimony of Mr. and Mrs. Edmonson is evasive, contradictory and lacking in frankness. Mrs.

Edmonson testified that she had placed no value upon the separate pieces of property conveyed to her (R. (2) 449); that they purchased the property for just exactly the amount of the indebtedness. There was no bargaining in respect to the property or any piece thereof (R. (2) 207-208). The rent was collected by Mrs. Brannon. Mrs. Edmonson had no idea as to the amount of rents Mrs. Brannon had paid her (R. (2) 450); was not familiar with the rent upon a single piece of property; has the money but never put it in the bank (R. (2) 453). She testified that she did not know that two deeds were executed covering the property; says she started to collecting the rents the 1st day of September, 1943 (R. (2) 799). She testified that Mr. Newton approached them about making the sale of the property (R. (2) 804); says she did not know what revenue stamps were placed on the deeds or whether they were sufficient or not (R. (2) 447); says she was entitled to the rents from October 1st (R. (2) 450). She did not know who put revenue stamps on the deeds; she testified the deeds were made out in duplicate but she did not know why. She was asked why she did not get rents from the date of the deed; she said because it was not placed of record (R. (2) 209). She had no idea how much rent she received and put no part of it in the bank; was unable to state the purchase price of a single piece of the property (R. (2) 210-211); was not familiar with the rent upon a single piece of the property. She testified that Mr. and Mrs. Newton offered to let them have the property for the debt.

At (R. (2) 848), she testified as follows:

> "Q. So, you really don't know what was included in that transaction?
>
> 'A. Well, you see, I had that such a little while, until I didn't get familiar with it, and I didn't work up at the office all the time."

From her testimony (R. (2) 848 and 849), it is apparent that she had no idea what went into the deed; she knew absolutely nothing about the property she was buying.

The petitioner, Mrs. Edmonson, in her testimony, admitted that they cleaned the Newtons out (R2 861-862). She testified as follows (R2 861-862):

"Q. There wasn't anything else you could get but this real property?

"A. Not right then.

"Q. So, you took what was before you, what was available, and you could get?

"A. That's right.

"Q. And they didn't have anything else that you knew of? That was all you knew of they had?

"A. So far as I know that was all the real estate they had, but I don't know all about their business.

"Q. You don't know of any other property they had, real or otherwise?

"A. No, sir.

"Q. Whenever you took this property, you took all they had?

"A. We took all they offered us.

"Q. You took all the property that they *had* of any kind?

A. I think it was.

"Q. Fact of the business, that was your best judgment when you got that deed, you thought you were getting all they had?

"A. Yes, sir."

She gave no notice of any kind to the tenants that she had purchased the property (R. 871-872). She only went to the office two or three times after the deeds were executed (R. (2) 878-879). She gave a very unsatisfactory explanation as to how much rent she collected and what she had done with it (R. (2) 879-883). After considerable questioning, however, she stated that she put the money in a lock box. She consented that the lock box might be frozen by the

bank and the trustee might examine it (R. (2) 883-889). Before anyone had access to the box, the trustee examined it and found it absolutely empty (R. (2) 896).

Mr. Edmonson testified that he did not talk to the Newtons before he got the deeds (R. (2) 459); that he went to Newton's office and Mr. Newton suggested that they take the property; that he went in and examined one piece of property which was an apartment house on Hardy Street before closing the transaction (R. (2) 460); that he merely looked at the property from the outside while driving by (R. (2) 461). He had no idea whatever as to the value of the furnishings in the house; did not place any value whatsoever upon the personal property; got the entire property as a whole, for a lump sum, including the Sims property; that it was assigned upon September 22, 1943 (R. 463-464).

Testimony of this character, instead of tending to bear the burden of proof incumbent upon Mr. and Mrs. Edmonson, characterized the same as part of the device and scheme of Mr. and Mrs. Newton to place their property beyond the reach of their creditors. That this was successfully done will more fully hereinafter appear.

(b) The conveyances were without consideration and, therefore, fraudulent and void.

The only consideration contended for the conveyances of the property in question by Mr. and Mrs. Newton were certain alleged partnership agreements between Newton and Glenn and Mr. and Mrs. J. B. Edmonson, referred to in the finding of fact and conclusion of law of the District Judge in the following language:

> "After the purchase by Newton of the interest of Glenn, Newton procured nineteen of the contracts, totaling the twenty-six. After Newton and Glenn procured the Camp Campbell contract and the Rohwer,

Arkansas contract and the Greenville, Mississippi contract, Newton entered into a sub-contract with John B. Edmonson and Mrs. John B. Edmonson as to his two-thirds interest in each of these contracts (by the terms of which the Edmonsons were to share in the Camp Campbell contract one-seventh of the profits or losses in Newton's two-thirds interest therein, and a like agreement as to the Greenville contract and to share one-third of the profits or losses of Newton's two-thirds interest in the Rohwer, Arkansas job)." (R. (2) 922).

Under these three contracts, Mr. and Mrs. Edmonson were to have one-seventh of Newton's two-thirds interest in the enterprises, sharing in profits to the same extent as well as the losses, and it was claimed that, upon the 15th day of August, 1943—immediately following Newton's conference with the bankers in Memphis wherein he doubtless anticipated the probability that the bankers would not go forward with him, since he knew his condition better than they did, and he knew that, instead of owing $140,000.00 to subcontractors, he owed $650,000.00, and he knew he had to have $230,000.00 on his payroll at Brunswick—according to their testimony, R. G. Wooten, an auditor, purported to make out the profit payable to Mr. and Mrs. Edmonson under said three contracts, and figured that there was $52,000.00 due each one of them. It is claimed that the deeds of conveyance here involved were executed in settlement of the said $104,000.00.

The property conveyed was of very great value. Newton, in his statement of March 31, 1943, stated that the property was valued at $451,000.00, exclusive of furnishings, and rented for $5,734.50 per month (R. 358-359). Newton testified (R. 405) that the property was worth $451,000.00, and again testified to the same effect (R. 651). Mrs. Newton testified that the property had a value of $451,000.00 (R. 716).

Mr. Paul Mote, who audited the books of Newton following his default, audited the income from the Receivership of the properties for twenty-three months. The net income for the twenty-three months, that is to say the income after the payment of taxes, insurance, and repairs, was $85,-487.24. The net income for one month was $3,716.87, and the net income for one year, $44,602.44. Exclusive of the Receiver's compensation, the property as operated by the Receiver would have yielded 6% income on a valuation of $743,374.00, 8% income on a valuation of $557,530.00, and 10% income on a valuation of $446,024.40 (R2 — 832). The District Judge, in his finding, fixed the value of the property on the date of the conveyances at $450,000.00.

The only property which Mrs. Edmonson owned was a one-half interest in 200 acres of country property in Jackson County, Mississippi, and property assessed at Hattiesburg, Mississippi, at $1,000.00. Mrs. Edmonson testified that she contributed nothing to the capital, rendered no services of any kind; that she had nothing to do with the making of the contracts whatsoever (R. 440-443). She testified that the mortgages on the property were being paid off and the property carried out of the rents (R. 450-451).

It will be noted that Mrs. Newton was not a party to the contracts of partnership, and was not obligated to pay Mrs. Edmonson anything. It will be further noted that the greater portion and most valuable portion of the property conveyed belonged to Mrs. F. T. Newton. She owed neither her sister nor Mrs. Edmonson any sum whatsoever. Not a dollar was paid by either Mr. or Mrs. Edmonson as consideration for the conveyances; no property of any kind conveyed therefor. This valuable property worth $450,-000.00, plus furnishings of $30,000.00 to $50,000.00, renting for approximately $5,000.00 per month, was conveyed to Mrs. Edmonson, the sister of Mrs. Newton, by reason of the alleged contract. We submit, if the Court please, that the

conveyances were nothing more than a gift from Mr. and Mrs. Newton to Mrs. Edmonson. It is perfectly clear from this record that the entire consideration was simulated, and had no basis as a matter of fact. The District Judge, in his conclusion, found that Mrs. Edmonson contributed nothing to any of the contracts, never went to either one of them except upon a short visit with her husband, didn't even know what they were all about, and yet the District Judge justified the conveyance of this valuable property to her upon this simulated consideration.

In respect of which we submit that the agreements were not partnerships at all under Mississippi law. They were lacking in every essential element necessary to the formation of a partnership under Mississippi law.

In the case of *Cudahy Packing Co.* v. *Hibou,* 46 So. 73, 92 Miss. 234, 18 L. R. A. (N. S.) 975, the Supreme Court of Mississippi held that the essentials of a partnership were (1) community of interest in the partnership property; (2) joint ownership in the business; (3) each member of the partnership should be an agent therefor with right of participation in the management.

Other Mississippi cases are *Lipscomb* v. *State,* 114 So. 754, 148 Miss. 410; *Baker* v. *Connecticut General Life Ins. Co.,* 18 So. (2) 438, 196 Miss. 701.

It is held in the foregoing cases that mere participation in profits is insufficient to constitute a partnership. This rule is announced 47 C. J. 669-670. The partnership instruments involved were carefully drawn so as to exclude Mr. and Mrs. Edmonson in the proprietorship, ownership or control of said operations.

The agreement contains the following language (R. 218):

> "It is further understood and agreed by all of the parties hereto that the said F. T. Newton is to conduct and manage the construction and carrying out of said contract in accordance with his own judgment of the

same and that the said F. T. Newton shall have full power to control said construction in every particular and it is hereby agreed that the power of attorney for and on the part of each of the above six parties is hereby vested in the said F. T. Newton to execute full determination and control of said construction provided for in said contract."

The United States Circuit Court of Appeals places emphasis upon the total exclusion of the members of the alleged partnership from any participation therein whatsoever. The transaction is fraudulent on its face. These contracts were what is known as family partnerships, made for the purpose of avoiding income tax. Your Honors will take judicial notice that of recent years there has grown up a custom among some business enterprises to make what is known as family contracts. These contracts are not made with the idea that members of the family will take any part in the management or make any contribution to the capital, but purely for the purpose of defrauding the United States Government and State authorities out of taxes.

In determining this question the Courts hold that the facts of each case must be determined in the light of the proof, but the Courts are unanimous in holding that if the contract is made for the purpose of diminishing income tax and for no other purpose, then the arrangement is fraudulent and void. The leading case upon the question is that of *Commissioner of Internal Revenue* v. *Frances E. Tower,* 327 U. S. 280, 90 L. Ed. 670. That case involved a partnership agreement between husband and wife, and the Court held that since there was a showing that the arrangement was made for the express purpose of reducing taxes simply, that the agreement was ineffective.

The District Judge made a finding of fact that these

partnership agreements were made for the purpose of diminishing income tax. The Court used the following language:

> "These sub-contracts were made undoubtedly for the purpose of diminishing the income tax of Newton, which under the law at that time was permitted, and at that time there was no thought in the minds of any of the parties of delaying or hindering any creditor in the payment of his claims." (R. (2) 925).

It must be borne in mind that in the bankruptcy proceedings the United States Government has proved the claim of unpaid taxes against the bankrupt of some $250,000.00. If the arrangement may not be used to defraud the United States Government of taxes, neither may it be resorted to as a device to defraud the creditors of Mr. and Mrs. Newton. Mr. Newton was familiar with transactions of this character. He testifies that he treated his wife, Mrs. Newton, as a partner in Newton and Glenn in 1942 purely for income tax purposes (R. 661-664). Mr. Glenn testified undisputedly that the contracts with Mr. and Mrs. Edmonson were purely for taxation purposes, and that he had such understanding with Mr. Newton (R. 775).

The writer of this brief does not mean to admit the correctness of the alleged audit whereby it is claimed that Mr. and Mrs. Edmonson had a share in the profits equal to $104,000.00. The correctness of this audit is involved in doubt, especially in view of the fact that it took place immediately after Mr. Newton's return from Memphis in August for a conference with his bank creditors, but whether the results of the audit are correct or not, the indebtedness was purely fictitious and may not support the conveyances complained of.

In the case of *Scherf* v. *Commissioner of Internal Reve-*

nue, Fifth Circuit, 161 Fed. (2d) 495, the Court used the following language:

> "Textbooks and decisions on tax law are strewn with the wrecks of abortive schemes of individuals to achieve the greatly desired end of dividing their income for tax purposes with persons who did not earn it."

Other cases are *A. L. Lusthaus* v. *Commissioner of Internal Revenue*, 327 U. S. 293, 90 L. Ed. 679; *Appel* v. *Smith, Collector of Internal Revenue*, Seventh Circuit, 161 Fed. (2d) 121; *Mauldin* v. *Commissioner of Internal Revenue*, Fourth Circuit, 155 Fed. (2d) 666, where the Court used the following language:

> "In summary, this case merely represents another in the stream of cases now coming before the courts wherein taxpayers have sought by various types of reallocation of income within the family group to retain the enjoyment of a large income without the normally incident tax consequences."

See the case of *Hash* v. *Commissioner*, Fourth Circuit, 152 Fed. (2d) 722.

Counsel cite the case of *Occidental Life Ins. Co.* v. *Eiler*, Eighth Circuit, 125 Fed. (2d) 229. The citation is erroneous. Counsel had in mind the case of *Hargrove* v. *American Central Ins. Co.*, Tenth Circuit, 125 Fed. (2d) 225, wherein the court announced the well established rule that the findings of the trial court are presumptively correct.

The rule is applicable to this case. The District Judge heard the witnesses testify and has made a special finding of fact that the arrangement was purely one to avoid the payment of income tax.

Counsel cite the case of *Butte & Superior Copper Company, Ltd.* v. *Clark-Montana Realty Company*, 249 U. S. 12, 63 L. Ed. 447, where the rule is announced that this Court must accept the concurrent conclusions of the two lower

courts on the facts unless clearly and manifestly wrong. We now invoke this rule. The District Judge held that the arrangement was purely for the purpose of avoiding income tax. The Circuit Court of Appeals concurs in that finding. The District Judge erroneously interpreted the law, however, in that respect, which the Circuit Court of Appeals corrected on its reversal, and we submit that the ruling of the latter court was in accordance with all of the authorities upon the question.

(c) *There are some special facts in respect to Mr. J. B. Edmonson to which the attention of the Court should be directed. These facts are not disputed.*

It is undisputed that Mr. Edmonson had been in the employ of Newton and Glenn prior to the making of the contracts, and subsequent to the making of the contracts, upon a salary basis of $75.00 per week, payable weekly. The duties performed by him were those of purchasing lumber for the partnership. Edmonson claimed, however, as did Mrs. Edmonson and Mr. and Mrs. Newton, that entering into the contracts in question was an inducement to close a lumber yard he had in Hattiesburg and that, therefore, he was entitled to the $52,000.00 in accordance with the terms of the contract. However, the evidence undisputedly shows that Newton transferred to Edmonson, about the time the storm hit, in excess of $40,000.00. Newton admitted (R. 707) that, about October 1, 1943, he paid Edmonson approximately $50,000.00. At (R2—523), Newton deposited to Edmonson's credit in the First National Bank of Hattiesburg $16,666.33, and again upon October 1, 1943, Newton transferred to Edmonson's account $14,421.84 (R2—524). Again, Newton admits that $8,000.00 went to Edmonson October 1, 1943 (R. 707). When this money was transferred to Edmonson, however, it was drawn out and went

underground and nobody has ever located it since. In addition to the foregoing, it was admitted of record R2—890) that Edmonson received a check for $5,000.00 dated October 2, 1943, a check for $5,000.00 dated October 5, 1943, and that Mrs. Edmonson received a check October 9, 1943, for $1,750.00, which makes a total of more than $50,000.00 received by the Edmonsons from the Newtons, which immediately went underground. It has made no track since and has never been heard from. Newton testified that he transferred the money to Edmonson to pay invoices for lumber; that he doesn't know, however, that the bills were ever paid. He further testified that Edmonson gave him the money back but could not remember when Edmonson did so. He testified that the money was turned over to Mrs. Newton who counted it; that he gave it all to his attorneys; said he saw Edmonson give Mrs. Newton part of it; that Mrs. Newton told him Edmonson gave the money back to her; that he didn't take the money to his attorneys in person but thought Mrs. Newton took it up to them (R2—344-347). He finally admitted, however, that he was mistaken in stating that Edmonson used the money to pay lumbermen whom Newton owed and whom he expected Edmonson to pay. Upon the other hand, he admitted that these lumbermen presented their claims for very large amounts against the sureties for labor and material furnished in the projects, and were paid by the sureties (R2—349).

Edmonson testified that he gave the money back to Newton (R2—468-469). He then testified that he thought he gave the money back to Mrs. Newton; that he didn't see it returned to Newton, didn't know that the money had ever been returned (R2—474). He introduced receipt purporting to be from Mr. and Mrs. F. T. Newton, signed by Mrs. Newton, for $31,000.00 (R2—419). This receipt, however, was signed by Mrs. Newton for Mr. Newton, and the Court

must bear in mind that the District Judge has convicted Mr. and Mrs. Newton of gross fraud in this case.

We called attention of the Court, however, to the fact that the money passed out of the bank to Edmonson and it has never made a track anywhere since that time. The Edmonsons had no enforceable contract by reason of the partnership agreement against Mr. F. T. Newton at the date of the execution and delivery of the deeds complained of, and the conveyances were pure gifts without consideration, from which it necessarily appears that the grantee, Mrs. Edmonson, held the title in trust for the grantors.

(d) Question of Revenue Stamps. It was the duty of the vendors under the Federal statutes to place revenue stamps upon the deeds in question based upon the consideration therefor.

Mr. and Mrs. Newton, as well as Mr. and Mrs. Edmonson, testified that the consideration for the execution of the instruments was the assumption of outstanding mortgages of $84,000.00 covering the properties in question, together with contract balances of $104,000.00. The record discloses that this statement is untrue. The property may have been subject to outstanding mortgages, but the grantee assumed a very limited portion thereof. As to the deed (R2—102), the grantee, Mrs. Edmonson, assumed (R2—104), the indebtedness of $12,500.00 to the Standard Life Insurance Company and at (R2—113) an indebtedness of $16,000.00 to the Standard Life Insurance Company, of Jackson, Mississippi, making a total of $28,400.00 assumed, and there were placed revenue stamps thereon (R2—114) of $11.00 which represented revenue stamps on $28,000.00 indebtedness assumed.

As to the deed (R2—115), we find the same assumption of mortgage indebtedness and revenue stamps of $11.00 placed thereupon covering $29,000.00.

As to the deed (R2—126), there is an assumption to the Prudential Insurance Company of $28,000.00 (R2—127), $450.00 to the First National Bank of Hattiesburg, $270.00 to the White System of Hattiesburg (R2—128), and $4,000.00 to the Standard Life Insurance Company, of Jackson, Mississippi, upon which deed there are revenue stamps of $14.35. It is perfectly apparent that the grantors were intending to pay revenue stamps upon the only consideration appearing in the deeds, which was the assumption of certain outstanding mortgage indebtedness, from which it necessarily appears that the alleged profit growing out of the three contracts with F. T. Newton and/or Newton and Glenn was an afterthought.

The evidence showed a lawyer by the name of George W. Currie, a previous President of the State Bar Association, drew these deeds, though he has gradually disappeared from this case. It is perfectly apparent that Mr. Currie was of the opinion that the assumption by the grantees of the indebtedness of the mortgage deeds of trust, above referred to, was an adequate consideration though no such contention is made at the present time, from which it appears almost conclusively that the assertion on the part of Mr. and Mrs. Edmonson that the real consideration was $104,000.00 claimed to be due them as members of the family partnership. It is perfectly clear that this was purely an afterthought. At all events there was no consideration whatsoever for the execution of these deeds. The deeds were merely executory gifts.

The contracts were nothing but executory agreements to make a gift and were void under the Mississippi law.

On the question of gifts, the partnership contracts are nothing in the world but executory contracts to make gifts. The giver never delivered the subject of the gift, but the same was always in the possession, or under the control, of the giver, who, as a matter of fact, converted the subject

matter of the gift to his own use. See the case of *Comfort* v. *Smith*, 21 So. (2d) 584; *McClellan* v. *McCauley*, 130 So. 145, 158 Miss. 456; *Marshall* v. *Stratton*, 51 So. 132, 56 Miss. 465; *Woods* v. *Sturgis*, 77 So. 186, 116 Miss. 412, L. R. A. 1918C, 338; *Smythe* v. *Sanders*, 101 So. 435, 136 Miss. 382; *Meyer* v. *Meyer*, 64 So. 420, 106 Miss. 638. It is well settled that there must be a complete execution. An agreement to make a gift, if anything remains to be done, is merely executory and may not be enforced. See C. J. S., Vol. 38, page 793, *et seq.* It is very true that there may be a constructive or symbolic gift, but there must not be a mere contract to deliver, there must be an actual delivery, and here, the only thing the Edmonsons had was the contract to give them certain profits.

(e) *A dividend of partnership property could not be declared in favor of other partners.*

It was claimed by petitioner and her husband that they were members of a subpartnership with Mr. and Mrs. Newton, and that the profits accruing to herself and her husband out of the said partnership amounted to $104,000.00. The facts are undisputed, as will hereinafter appear, that the Newtons owed enormous sums of money to unsecured creditors and that the sureties were called upon, as sureties for Newton & Glenn and Mr. and Mrs. F. T. Newton, to pay large sums of money for labor and material growing out of the various projects. We do not mean to say that there were any claims for labor and material growing out of the particular jobs involved in the three contracts. The property was partnership property and could not be distributed to members of a subpartnership, if any there was. The creditors had a lien thereupon for the payment of their debts. The following cases are directly in point: *Clay* v.

Freeman, 118 U. S. 97; *Hanway* v. *Robertshaw,* 49 Miss. 758; *Robertshaw* v. *Hanway,* 52 Miss. 713; *Meyer* v. *Meyer,* 64 So. 420, 106 Miss. 638; *Wilson* v. *Simmons,* 5 Cir., 270 Fed. 84; D. F. Matheson, an accountant, made up a statement for Newton & Glenn listing the property as partnership property (R. 892-896).

See the very interesting case of *Robinson Bank* v. *Miller,* 153 Ill. 244, 46 A. S. R. 883.

(f) At the time the conveyances complained of were made, the Newtons were in a desperate financial condition.

The fact that the grantors in the conveyance were in an embarrassing financial condition has, in connection with other circumstances, always been regarded as a badge of fraud. The Supreme Court of Mississippi so held in the case of *Reid* v. *Lavecchia,* 193 So. 439, 187 Miss. 413. The same rule is announced in American Jurisprudence, Vol. 24, Section 20.

The evidence is undisputed that Newton had accumulated a very large payroll at Brunswick, Georgia, aggregating $230,000.00, which he was unable to pay. He was in default with subcontractors in the sum of $640,000.00. Paul Mote, the auditor, testified that Newton's liabilities were $2,900,000.00 (R. 152-153) and unsecured claims were proved in the bankruptcy proceeding against Mr. and Mrs. Newton aggregating $2,387,491.32 (R2—821). The Trustee testified undisputedly that he had received and had on hand $22,600.00 (R2—891); that he had received other property appraised at $3,282.00, and the estate would yield very little more than the cost of administration.

(*g*) *The dates of the deeds of conveyance were changed subsequent to their execution, which is a very strong badge of fraud.*

The deeds as placed of record showed that they were executed upon the 23rd day of August, 1943, which would be Monday. The deeds were filed upon the 6th day of October, 1943. Upon the 16th day of October, 1943, they had not even been indexed due to the fact that rumors were in circulation concerning the conveyance of the property; counsel for bank creditors went through the deeds on file in the Chancery Clerk's office and found the three deeds in question. Mr. and Mrs. Newton, Mr. and Mrs. Edmonson, and Mrs. Brannon, the Notary Public, testified that they were executed in Mr. Newton's office upon the 22nd day of August, 1943. Mrs. Edmonson (R. 799); F. T. Newton (R2—353). It was admitted that the 22nd day of August would be Sunday (R2—354. Mrs. Newton (R2—594). The testimony of Mrs. Brannon, Notary Public, and Mr. Edmonson, it is admitted, was to the same effect.

The original deeds are before the Court. It is only necessary that Your Honors examine them from which it undisputedly appears that they were executed upon the 22nd day of some month ending in "ber". In this case it necessarily was September, since the deeds were filed for record prior to the 22nd day of October.

The appellants introduced A. E. Crawford, an expert in the examination of documents. Mr. Crawford examined the original deeds (R2—175-176). He testified that the deeds had been changed from the 22nd day of some month ending in "ber" to the 23rd day of August, 1943. The deeds had been filed upon the 6th day of October, 1943 and recorded upon the 14th of October, 1943. Revenue stamps were

placed thereupon and cancelled upon the 9th day of October, 1943, which was three days after the deeds were filed for record (R2—178).

The District Judge held that the matter wasn't material and that the testimony was insufficient to overthrow the presumption of the acknowledgment on the part of the Notary Public (R2—926). The presumption as to the correctness of the certificate of the Notary Public disappears when Your Honors look at the original deeds from which it is apparent that the date has been changed. The District Judge, however, held that the changing of the date would be immaterial. As to this he is mistaken since it appears that the dates were changed, for we have five witnesses under oath swearing falsely as to the date of the deeds which would completely destroy their testimony for any purpose whatsoever. But not only that: The reason for the changing of the deeds is perfectly apparent. Newton was being crowded for payrolls at Brunswick and for payment on the part of his subcontractors. The bankers were giving evidence of dissatisfaction. Their checks for income taxes for 1942 were dishonored upon September 16. Therefore, it is perfectly apparent that Newton made up his mind prior to September 22, 1943, to go underground, and he proceeded to do so as we have hereinbefore and we shall hereinafter point out. Not only is it apparent and uncontrovertible that the deeds were changed upon their face and back-dated, but it is undisputed that, at the same time, Mrs. Edmonson acquired the real property from the Newtons, she acquired what is known as the Sims note aggregating $3,500.00 which the Receiver testified he had collected, and the transfer of this note, which witnesses say took place at the same time, occurred upon the 22nd day of September, 1943 (R2—458).

We respectfully submit that this transaction in itself

should condemn the conveyances as absolutely fraudulent and void. The evidence established with reasonable certainty that Newton was not even in Hattiesburg on the 23rd day of August, 1943 (R. 1097). It was established almost beyond doubt that he had his automobile repaired in Atlanta, Georgia, on the afternoon of August 23, 1943, for which he paid $47.60 (R. 1138-1140).

(*h*) *The Newtons, having disposed of their real estate, proceeded with equal dispatch to conceal such personal property as was owned by them.*

The District Judge in his findings stated that it was not until after October 16, 1943, that Newton converted and concealed his property (R2—927). In this respect the learned District Judge is in error. Newton's checks were dishonored on September 16th (R. 663-664). He then began to convey away his property, executing the deeds of conveyance complained of upon September 22, 1943, and transferred the Sims note of $3,500.00 at the same time. As appears from the foregoing statement, in the last days of September and the first few days of October, he transferred to Mr. and Mrs. Edmonson approximately $50,000.00 in cash. Not only that, but:

(a) The evidence shows that the sureties employed a firm of auditors, Respess and Respess of Atlanta, Georgia, who sent auditors at once to Hattiesburg to analyze the affairs of F. T. Newton. These auditors remained there with numerous assistants untangling this complicated situation for about nine months. Mr. Mote found numerous accounts on the books of Newton showing persons indebted to him. The books of Newton were checked against the books of the debtors as appeared from Newton's ledger and it was found that they had been paid (R. 1023). The auditors

traced to Mr. and Mrs. Newton the following items which left no track:

October 18, 1943—Check to cash signed by F. T. Newton	$850.00
October 21, 1943—Check signed by Mrs. F. T. Newton	1250.00
October 20, 1943—Check to cash signed by Mrs. F. T. Newton	3500.00
October 21, 1943—Check to cash signed by Mrs. F. T. Newton	3000.00
October 23, 1943—Check to cash signed by Mrs. F. T. Newton	271.92
October 21, 1943—Check to cash signed by Mrs. F. T. Newton	143.83
Total	$9,015.75

of which amount $2,766.91 was used to cover overdrafts. Of the balance, $352.87 was used to take up checks in the office that had been returned, and the difference of $5,895.97 went underground (R. 1046-1047-1048).

Mote testified about checks to J. B. Edmonson, $31,096.15 (R. 1049). Approximately $2,000.00 in checks to deVillentroy (R. 1049). Mr. Mote testified that there went out in cash items, including the money to Edmonson and the money to deVillentroy, $87,347.94 (R. 1049-1059). This fund was all withdrawn, and went under cover, between the 30th day of September and the 5th day of October, 1943.

It will be noted from the foregoing that Newton's checks began to go to protest prior to October 1, 1943.

(i) *Consolidated Construction Company, Inc.—deVillentroy Transaction.*

There was never a more shady transaction revealed in any Court than that which the undisputed testimony establishes in this case in respect to Newton disposing of equipment which he accumulated in his warehouse in Hattiesburg, Mississippi. Newton's auditor, Dumain, testified that upon August 31, 1943, Newton had materials in his warehouse in Hattiesburg aggregating $126,651.02 (R. 1225-1227). His materials on hand in the warehouse at Hattiesburg as shown by his statement of March 31, 1943, was $112,010.00 (R2—337). Newton testified that, as of August 31, 1943, he had materials in the warehouse at Hattiesburg of the value of $126,651.02 (R. 1227). Having disposed of his valuable real estate to Mrs. Edmonson where they thought it would be perfectly safe and within reach, it was necessary that they get rid of this valuable equipment consisting largely of what is known as electrical equipment, because Newton had many contracts where such equipment was required, as well as large quantities of valuable contractors' material. Necessarily the question presented itself to Newton, "How am I going to get this property out of the way?"

Upon the 13th day of October, 1943, John B. Edmonson and Mrs. John B. Edmonson, his wife, the petitioner, and J. B. deVillentroy, the latter as will hereinafter appear being a flunky of Newton's obtained from the State of Mississippi a charter for the Consolidated Construction Company, Inc. (R. 798).

Mr. Wills, attorney for the Newtons and the Edmonsons, testified that he advised Mr. Newton to sell the property to the Consolidated Construction Company (R. 1164).

B. E. Barrett (R. 1121), who lived with his family right next door to the warehouse, testified that large quantities

of material were moved from the warehouse by truck, both in the daytime and at night. Mrs. B. E. Barrett, his wife, likewise testified that, both in the daytime and at night, by means of large trucks, property was hauled away from the warehouse (R. 1124). J. M. Hyche (R. 1423), an employee of Newton's and convicted of selling liquor, states that, at Newton's request, he moved nearly everything out of the warehouse in Hattiesburg and stored the same at New Orleans, Louisiana.

It was Newton's purpose to sell this property to the Consolidated Construction Company, Inc., a corporation incorporated by deVillentroy and the Edmonsons doubtless for no other purpose than to assist Newton in getting rid of the property. We have heretofore made reference to the testimony of the Auditor, Mote, which showed that in excess of $20,000.00, about the 1st of October, 1943, passed from Newton to deVillentroy, the latter being a resident of the city of New Orleans, and the following remarkable statement of facts occurred:

On November 28, 1943, Mr. and Mrs. deVillentroy had an amount in excess of $20,000.00 in their checking and savings account in the American Bank and Trust Company, of New Orleans, Louisiana, subsequently known as the National American Bank of New Orleans. By telegram on the aforesaid date, the New Orleans bank transferred this amount to the First National Bank of Hattiesburg for the account of deVillentroy. Upon December 6, 1943, the First National Bank of Hattiesburg transferred $19,000.00 to the credit of the Consolidated Construction Company, Inc., in the New Orleans bank and, upon that date, deVillentroy took Newton to the New Orleans bank and introduced him to the officers. Newton held a check dated December 6, 1943, payable to himself drawn by the Consolidated Construction Company, Inc., in the amount of $10,236.00. The check contained an endorsement that it was in payment

of equipment sold by Newton to the Consolidated Construction Company, Inc. An officer of the bank o.k.'d the check, and Newton stepped to the window of the paying teller and received ten $1,000.00 bills and $236.00 in small change. In less than ten minutes, deVillentroy at another window deposited to the credit of the Consolidated Construction Company, Inc., ten $1,000.00 bills, and a few days later the difference of $236.00 was placed to the credit of deVillentroy in the First National Bank of Hattiesburg, Mississippi. These facts appear from the testimony of the officers and employees of the National American Bank of New Orleans, Paul Blum (R. 1892), Ralph A. Preston (R. 1901), and Louis Kruser (R. 1904). The exhibits will be found (R. 1907-1909). See also the testimony of W. B. Jones, officer in the First National Bank of Hattiesburg (R2—312-318).

It is very true that these transactions were vigorously denied by Mr. Newton and Mr. deVillentroy but, unfortunately for them, the District Judge couldn't take it. The Court made the following finding (R2—928):

> "A different situation arises, however, as to the conveyance to J. B. deVillentroy, as the testimony is clear and convincing that he had knowledge of the insolvency of Newton, and the conveyances were made without consideration and with the intent to hinder, delay, and defraud creditors. Likewise, the trustee is entitled to recover the sum of $22,000.00 from him, which was paid within the four months prior to November 3, 1943. A decree may be drawn in accordance with this opinion and submitted to me for signing."

The Court further rendered a personal judgment decree against deVillentroy for the sum of $22,000.00 and required him to return the equipment involved in the sale from Newton to the Consolidated Construction Company, Inc., December 6, 1943 (R2—936).

(j) The Totten transaction.

Subsequent to the first day of October, 1943, Newton had at least three uncompleted contracts. Upon each of them, large quantities of electrical equipment was needed. Newton had operated his electric business as Mississippi Electric Company though it belonged to him and was simply a branch of his business. A man by the name of Totten worked for him on a salary. Soon after the first of October, it was necessary that this electric business be carried on for the benefit of the Newtons, so an arrangement was worked out whereby Totten would remove the electrical equipment from the warehouse at Hattiesburg, Mississippi, take it to the various jobs and furnish them with the understanding that Newton was to get the benefit. As a matter of fact, Newton furnished large sums of money therefor. But not only that: Newton needed a go-between as between himself and Totten, so the proof undisputedly shows that Mr. J. B. Edmonson, husband of appellee, Mrs. J. B. Edmonson, consented to act in this capacity for Newton. He thoroughly understood that secretly the Mississippi Electric Company was being conducted by Totten for the benefit of the Newtons, and he permitted the business to be carried on in his name. The Newtons furnished large sums of money and they expected to make a very large sum of money out of it. These transactions were going on pending the application for a Receiver, were kept secret even pending the bankruptcy proceedings. The Newtons never, in their schedules in bankruptcy, accounted for the profits which they received therefrom. The profits went underground and the Newtons still have them. All this is brazenly admitted in the testimony of J. B. Edmonson (R2—509-510-511). It was admitted in the testimony of Mrs. Newton (R2—573, 575, 578, 600-612). Mr. F. T. Newton testified to the same effect. In fact there was no dispute of any character about this

transaction. He testified that Totten hauled away $50,000.00 to $60,000.00 worth of material (R2—753-754).

(*k*) *The property stored on the Turner Place owned by Mrs. Edmonson.*

Having transferred a large portion of the personal property out of the warehouse to New Orleans, and having delivered $50,000.00 to $60,000.00 worth of the property to Totten to be used for the benefit of Newton, there was still some property left in the warehouse. This property was conveyed and stored in a small dwelling situated upon the property conveyed to Mrs. Edmonson in Forrest County. H. H. Rushing (R. 1079), testified that he lived in the neighborhood of the property, and that material was brought from the warehouse in Hattiesburg and stored in a small residence on that farm; that so much of it was stored there it broke the floor down. Bill Mott, a negro living in the same neighborhood (R. 1082), testified to the same facts. He saw material hauled out from Hattiesburg and stored in that small house. After the Receiver was appointed, he took possession of the property which had been stored, and the same was invoiced at $5,200.00 (R. 162).

(*l*) *Property concealed at Newton's home.*

The testimony showed undisputedly that G. M. McWilliams, Trustee, recovered remnants of electric material turned over to him by Totten (R2—892), and he also discovered some building material at Newton's home on the Monroe Road, which was appraised at $3,282.00, found them concealed in Newton's barn covered up with hay (R2—893); describes the material which he found there (R2—893-894). While looking through the hay in Newton's barn, he found an electric drill. He left it there temporarily intending to go back and get it. When he went back to

get it, it had been removed and he saw evidence of fresh automobile tracks on the side of the house (R2—894-895). The net result was that, when the Receiver took charge, he found in the warehouse electrical supplies of the value of $1,000.00 (R2—171). All the remainder of the property had been removed in the manner hereinbefore pointed out.

(*m*) *Part of the real estate rented out to Mrs. Edmonson's brother.*

After the Receiver was appointed, he wished to derive some revenue from the farm known as the Turner Place in Forrest County, conveyed to Mrs. Edmonson. He found that the property was claimed under a five-year lease from H. C. Flurry, who was a brother of Mrs. Edmonson and Mrs. Newton, and he was unable to derive any benefit from the property.

(*n*) *The Samuels transaction.*

At the time Mr. and Mrs. Newton conveyed the property to Mrs. Edmonson, among the properties conveyed was a two-story office building on Front Street. The first floor had been occupied by the Western Union Telegraph Company at a rental of $60.00 per month. Pending the application for a Receivership, a man by the name of Samuels wanted to rent the property– the Western Union was giving it up—so Mrs. Edmonson and her attorney told him he could not have the property unless he paid $125.00 a month for twelve months in advance. He paid $125.00 for the month of December, 1943, and then paid one year's rent, to-wit, the entire year of 1944, in advance. Mr. Samuels paid $1,625.00 in advance to cover the rent from December 1, 1943, to January 1, 1945 (R2—172). This transaction took place pending the application for a Receivership, the money immediately disappeared and was never accounted for to the Receiver.

(o) *F. T. Newton employed and paid Counsel who had entire control of the defense of the litigation.*

The record in this case discloses undisputedly that Mrs. Edmonson and Mr. and Mrs. Newton have appeared by and through the same counsel. Mrs. Edmonson testified that, when the present suit was filed, Mr. Wills so notified her (R. —).

Upon the 20th day of October, which was prior to the time the Government had cancelled Newton's contracts which occurred on the 26th and immediately following the visit of the bankers to Hattiesburg and the discovery of the conveyances to Mrs. Edmonson, Newton contracted with his attorneys to defend Mrs. Edmonson's title to the property. At (R. 764) will be found the stipulation, which contains the following provision:

> "It is further contemplated that in the winding up of the partnership agreements, in which certain real estates in the City of Hattiesburg were conveyed by the said F. T. Newton to Mrs. John B. Edmonson, that litigation will develop over the validity of said transfers.
>
> "Now it is agreed that a fee of $2500.00 is to be charged and paid by the said F. T. Newton to the said T. J. Wills to assist in the litigation over the title of said property. That a fee of $5000.00 on the Brunswick, Georgia, job would be a reasonable fee but taking the twenty-three projects as a whole, it is agreed by and between the said F. T. Newton and T. J. Wills that a fee of $25,000.00 will be paid to assist in the litigation growing out of the twenty-three housing projects and the property litigation which is threatened."

In other words, Mr. and Mrs. Newton not only gave their valuable property to Mrs. Newton's sister, but undertook to defend the transaction. Mrs. Edmonson never had any separate counsel of her own. It is never contended in this

case that she employed or contracted to employ any attorney. This litigation was defended by defendants employed by Mr. and Mrs. Newton, the only parties at interest. This is indeed a "raw" transaction, speaks for itself, and if no other fact were present in the case should condemn the conveyances sought to be set aside. It establishes that Mrs. Edmonson had no real interest in the transaction. She was merely holding the title for Mr. and Mrs. F. T. Newton in order to enable them to defraud their creditors.

(*p*) *Newton's transaction with Dr. Wright.*

Mr. Newton, in his statement of March 31, 1943, showed that he had a $15,000.00 life insurance policy in the New York Life Insurance Company. He was called upon to show what became of it. He testified that he borrowed $10,000.00 upon it from a relative of his by the name of Dr. Wright, in the State of Alabama. This loan was handled just about like the deVillentroy loan in New Orleans (R2—781). While on the stand, Mr. Newton was examined about his borrowing money from Dr. Wright, and from his testimony with exhibits which were introduced, it conclusively appears that Mr. Newton gave Dr. Wright $10,000.00, or a check therefor; that Dr. Wright took the money and delivered it to the bank, and Mr. Newton borrowed it, giving a note payable to Dr. Wright and receiving the same $10,000.00. This appears conclusively (R2—781, 782, 783, 784, 785). In this way, Mr. Newton was able to defraud his creditors of the cash surrender value of the policy.

(*q*) *The delivery of bonds to Reuben T. Newton.*

Reuben T. Newton, a brother of F. T. Newton, as well as T. E. Newton, the father of F. T. Newton, were parties to one of the family profit contracts which have been here-

inbefore referred to. Mrs. Newton had $40,000.00 in government bonds which she had acquired from time to time, but they must get rid of these bonds.

Reuben Newton practiced law in some small town in Alabama. Mrs. Newton testified that she delivered $40,000.00 in bonds to Reuben Newton, her husband's brother (R2—565-566); that she was going to Washington in 1944 to cash the bonds (R2—566-567); that the bonds were redelivered to her by Reuben Newton at the railroad station in Mobile, Alabama, between the 1st and 14th of August, 1944 (R2—568). She states that she went to Washington and cashed the bonds.

Mrs. Newton testified that she met Reuben Newton in Mobile and delivered to him the proceeds of the bonds which she collected from the United States Government. The transactions between Mr. and Mrs. F. T. Newton and the Newton family in Alabama show the grossest fraud, misrepresentation and contradiction. The same is too voluminous to be set out herein but will be found (R. 565-632); the description given by Mr. Reuben Newton of his taking the money from Mrs. F. T. Newton after spending part of it, placed it in a fruit jar which he buried in a post hole in his front yard.

(r) *Retention of Benefits.*

After the delivery of the deeds, the Newtons continued to receive the rents from Mrs. Brannan, the former employee of Mr. and Mrs. Newton. No notice was given to tenants of the change in the title and Mr. F. T. Newton had his offices in the building on Front Street, which he individually occupied without the payment of rent. The District Judge so found (R. 932):

> "The retention of possession is a pregnant circumstance, for it is not a change of possession where the vendee enters into possession jointly with the vendor.

> . . . Possession therefore of land, after an absolute conveyance, is evidence of a fraudulent design within the statute; and if this possession be accompanied with acts of ownership, the evidence of fraud under that statute becomes very hard to be resisted." *Wooten* v. *Clark*, 23 Miss. 75.

Johnston v. *Dick*, 27 Miss. 277. Other authorities are *Arthur* v. *Comm. & R. Bank* (Miss.), 9 S & M. 394; *Wooten* v. *Clark*, 23 Miss. 75.

The foregoing Mississippi authorities hold that this may not be done even for a limited period of time. Even after the appointment of a Receiver, the proof showed that Mrs. Newton visited the office of the Receiver every day, kept in careful touch with the situation, and that Mrs. Edmonson took no interest in the operations.

False Statements Made Commercial Agencies

Statements to sureties and banks did not include the alleged indebtedness to Mr. and Mrs. Edmonson. This was an indication of fraud. *English* v. *Friedman*, 12 So. 252, 70 Miss. 457.

POINT IV

No controversy is presented in this case between the respondent trustee in bankruptcy and petitioner as to the indebtedness, if any, of the Newtons to the bank.

Opposing counsel present the argument that Mr. and Mrs. F. T. Newton were not indebted to the banks, but the banks, by reason of their refusal to make further advances, were indebted to them.

Mr. and Mrs. F. T. Newton were adjudged bankrupts, and such portion of the testimony as is printed is disclosed in the three printed volumes in Cause No. 11,306, United States Circuit Court of Appeals. In that case Mr. and

Mrs. Newton contested the petition of the creditors to have them adjudged bankrupts, assigning, among other reasons, that they were not indebted to the banks in the sum of $1,500,000.00, or any other amount, but that, upon the other hand, the banks, by refusing to make additional advances, had caused them financial damage, and, therefore, the banks were indebted to them and they were solvent. The question as to whether or not the Newtons were indebted was involved in the suit for involuntary bankruptcy and was, necessarily, disposed of by the final decree in that case; otherwise, Mr. and Mrs. Newton would not have been insolvent.

Opposing counsel make extended reference to statements of the District Judge during the trial of the bankruptcy case to the effect that he reserved ruling on the question as to whether or not the indebtedness from the Newtons to the bank was owing. However, after the verdict of the jury was entered, upon a motion for a new trial and directed verdict, the District Judge entered a judgment adjudging Mr. and Mrs. Newton bankrupts. This was a final determination of the controversy and was an adjudication that Mr. and Mrs. Newton were insolvent upon the date of the execution of the instruments involved in this case. The evidence disclosed undisputedly that the Newtons owed the banks approximately $1,500.000.00 (R. 342-343), (R. 1754-1755). Mr. Mote, Certified Public Accountant, who audited the books of the Newtons, listed the notes as liabilities at $1,531,171.89 (R2—147), which, doubtless, included accrued interest. As we have heertofore pointed out, the proven claims filed with the Referee in Bankruptcy in this case aggregated approximately $2,300,000.00, exclusive of cost of administering the estate in bankruptcy (R2—821). Therefore the amount claimed to be owing by the bank or any other creditor in this proceeding was not a matter of inquiry. By agreement of counsel, Mr. Motes's testimony

was not printed (R. 541). There was no evidence in the record upon which any legal damages might have been awarded to Mr. and Mrs. Newton or either of them by reason of the banks' refusal to make further advances. Therefore, the District Judge, upon a re-consideration of the case, on motion for a new trial in the bankruptcy proceedings, doubtless, came to the conclusion that the indebtedness to the banks of approximately $1,500,000.00 was correct, sustained the motion for a new trial, and entered judgment for adjudication.

However, in this case, the question is only most incidentally involved. The Trustee in Bankruptcy, in obedience to the Federal Statutes, filed a suit to set aside the conveyances herein involved. It was the duty of the trustee to claim this property for the benefit of the estate, if the same was fradulently conveyed or if the conveyances constituted a preference. The question of whether or not Mr. and Mrs. Newton were indebted to the banks or the banks were indebted to Mr. and Mrs. Newton was not the determining feature in the case; that question had been settled in the bankruptcy proceedings. The petition of the respondent to intervene will be found (R2 47). The answer of the petitioner thereto will be found (R2—64). The question as to whether or not Mr. and Mrs. Newton were indebted to the banks was not mentioned in the pleadings. It is very true that in the trial of the present suit of the trustee to set aside the conveyances, the three volumes of testimony including the testimony in the bankruptcy trial, were introduced. They were introduced, however, not because of any controversy as to whether Mr. and Mrs. Newton owed the banks; that question was, necessarily, adjudicated in the bankruptcy decree. The bankruptcy record in Cause No. 11,306 was introduced primarily because the testimony tended to show fraud on the part of the parties to the conveyances and was relevant upon the question as

to whether or not preference was had. The question as to whether or not the Newtons were indebted to the banks was not the determining question, and, therefore, not involved in the pleadings, and, accordingly, has no place in this record. *Reynolds* v. *Stockton*, 11 S. C. 773, 140 U. S. 34, 35 L. Ed. 464; *Kelly* v. *Benton* (C. C. A.) 149 F. 466; *Wagoner National Bank* v. *Welch* (C. C. A.) 164 F. 813; *Dietrick* v. *Standard Surety & Casualty Co.*, 90 F. 2d 862, affirmed 303 U. S. 471, 82 L. Ed. 962, rehearing denied 304 U. S. 588, 82 L. Ed. 1548; *Osage Oil & Refining Co.* v. *Cotton Oil Co.* (C. C. A.), 44 F. (2d) 585; *Webster Eishler, Inc.* v. *Kay Loardner*, 141 F. 2d 316, certiorari denied 325 U. S. 867.

We respectfully submit that the application for certiorari both on the original and the amended petition should be denied because:

(1) The issue involved in this case may not be confined merely to the execution and delivery to the petitioner of the deeds of conveyance shown. Upon the other hand, it conclusively appears that the delivery of such deeds was but one step, and a carefully prepared device to place the property of Mr. and Mrs. Newton beyond the reach of their creditors. This case presents the most conspicuous instance of an attempt on the part of the debtors to defraud their creditors exhibited in American jurisprudence.

(2) Every badge of fraud known to the law, as well as numerous others never before conceived, are present in this case. Any finding that petitioner was free from fraud was unreasonable.

(3) The petitioner does not claim that the deeds executed may be based on any other consideration than the family partnership shown by this record. The District Judge expressly found that the agreement was one made to diminish the income taxes payable, thereby separating the

fruit from the tree. This finding has been concurred in by the Circuit Court of Appeals.

Respectfully submitted,

WILLIAM H. WATKINS, *Amicus Curiae,*
Attorney for Maryland Casualty Company and National Surety Corporation, Surety Creditors of Mr. and Mrs. F. T. Newton, Bankrupts.

Certificate

I, WILLIAM H. WATKINS, of counsel for the Maryland Casualty Company and the National Surety Corporation, Surety Creditors of the Bankrupts, Mr. and Mrs. F. T. Newton, certify that I have this day sent by United States Mail, postage prepaid, to Wilkinson & Skinner, Birmingham, Alabama, and to T. J. Wills, Hattiesburg, Mississippi, Attorneys for Petitioners, a true copy of the above and foregoing brief.

This, the 18th day of November, 1947.

WILLIAM H. WATKINS,
Of Counsel.

APPENDIX I

Section 1327, Mississippi 1942 Code: *Creditors May Attack Fraudulent Conveyances, etc.*—The said court shall have jurisdiction of bills exhibited by creditors who have not obtained judgments at law, or, having judgments, have not had executions returned unsatisfied, whether their debts be due or not, to set aside fraudulent conveyances of property, or other devices resorted to for the purpose of hindering, delaying or defrauding creditors; and may subject the property to the satisfaction of the demands of such creditors as if complainants had judgments and execution thereon returned "no property found." Upon such a bill a writ of sequestration or injunction, or both, may be issued upon like terms and conditions as such writs may be issued in other cases, and subject to such proceedings and provisions thereafter as are applicable in other cases of such writs; and the chancellor of the proper district shall have power and authority to grant orders for receivers, in same manner as if the creditor had recovered judgment and had execution returned "no property found." The creditor in such case shall have a lien upon the property described therein from the filing of his bill, except as against bona fide purchasers before the service of process upon the defendant in such bill.

APPENDIX II

Section 265, Mississippi 1942 Code: *Fraudulent Conveyances.*—Every gift, grant, or conveyance of lands, tenements, or hereditaments, goods or chattels, or of any rent, common or other profit or charge out of the same, by writing or otherwise; and every bond, suit, judgment, or execution had or made and contrived of malice, fraud, covin, collusion, or guile, to the intent or purpose to delay, hinder, or defraud creditors of their just and lawful actions, suits, debts, accounts, damages, penalties, or forfeitures, or to defraud or deceive those who shall purchase the same lands, tenants, or hereditaments, or any rent, profit, or commodity out of them, shall be from henceforth deemed and taken only

as against the person or persons, his, her, or their heirs, successors, executors, administrators, or assigns, and every of them whose debts, suits, demands, estates, or interests by such guileful and covinous devices and practices shall or might be in any wise disturbed, hindered, delayed, or defrauded, to be clearly and utterly void; any pretense, color, feigned consideration, expressing of use, or any other matter or thing to the contrary notwithstanding.

And moreover, if any conveyance be of goods or chattels, and be not on consideration deemed valuable in law, it shall be taken to be fraudulent within this statute, unless the same be by will duly proved and recorded, or by writing acknowledged or proved; and such writing, if the same be for real estate, shall be acknowledged or proved and filed for record in the county where the land conveyed is situated, and, if for personal property, then in the county where the donee shall reside or the property shall be; and the proof or acknowledgment in either case shall be taken or made and certified in the same manner as conveyances of lands and tenements are by law directed to be acknowledged or proved, unless, in the case of personal property, possession shall really and bona fide remain with the donee.